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In the

Supreme Court of the United States

October Term, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
*Petitioner,*

*v.*

STATE OF OHIO, ET AL.,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Arthur Andersen & Co. ("Andersen"), Defendant-Appellant below, petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a judgment of that court entered February 9, 1978 in an appeal from the United States District Court for the District of Colorado.

## OPINION BELOW

The Court of Appeals' opinion is reported at 570 F.2d 1370 (10th Cir. 1978).

## JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed were entered on February 9, 1978. On March 22, 1978 the Court of Appeals entered an order denying Andersen's petition for rehearing and suggestion for rehearing in banc. The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether a defendant ordered to produce documents from its office in a foreign country in violation of the criminal and civil laws of such foreign country, unless and until the consents of certain affected persons were first obtained, has been denied due process of law or unlawfully punished by the entry of a prejudicial preclusionary order and fine for its delay in producing such documents until the required consents were obtained where all of the documents ordered produced had been produced long prior to the hearing on sanctions and no trial date has yet been set.

2. Whether it is consistent with the Due Process Clause of the Fifth Amendment and Rules 34 and 37, F.R. Civ. P., for a federal district court, in the circumstances of this case, to impose sanctions under Rule 37 precluding a defendant from fully contesting a plaintiff's claims at trial, not for the purpose of compelling discovery, which had been fully made, or to redress prejudice, which did not exist, but solely to punish the defendant and to set an example for others.

## STATUTES INVOLVED

The statutes involved, which are set forth in Appendix A, pp. 16-24, are:

*Penal Code of Switzerland:*

Article 35 (Recueil Systematique du Droit Federal, Book 1, p. 9)

Article 36 (R.S.D.F., Book 1, p. 9)

Article 48 (R.S.D.F., Book 1, pp. 19-20)

Article 162 (R.S.D.F., Book 2, p. 57)

Article 273 (R.S.D.F., Book 2, pp. 89-90)

*Rules:*

Rule 34, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, p. 7793)



Rule 37, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, pp. 7798-99)

## STATEMENT

Andersen is a partnership of independent public accountants that has offices and conducts its professional practice throughout the United States and in numerous foreign countries. It is thus, like many other concerns, subject to the laws of the United States and the foreign countries in which it conducts its professional practice.

In the spring of 1970 the State of Ohio made two loans aggregating $8,000,000 to King Resources Company, an audit client of Andersen's Denver, Colorado office. In August, 1971 King Resources Company went into Chapter X reorganization proceedings. In April, 1972 Ohio filed suit against King Resources Company, Arthur Andersen & Co., and others seeking to recover the loans.

Prior to the cut-off of discovery as of April 3, 1976 Andersen had produced to Ohio approximately 55,000 documents which had been microfilmed by Ohio.

On May 27, 1976, on an application by plaintiff filed after the cut-off of discovery, the district court for the first time ordered Andersen to provide certain documents from its office located in Geneva, Switzerland. A subsequent related order set a final deadline of August 20, 1976 for full compliance.

On June 18, 1976, Andersen's Denver counsel commenced a file search in Geneva, Switzerland for the documents ordered produced. Two hundred twenty responsive documents were located. The responsive documents were reviewed with Swiss counsel, who determined whether, under Swiss criminal and civil law, they could be provided promptly or whether both the criminal and civil laws of Switzerland prohibited their production unless and until the consents of various non-parties were first ob-

tained because they contained the protected business secrets of such non-parties.

Appeals and mandamus were sought in respect of that order and certain related orders of the district court and a stay of such orders was obtained on July 23, 1976 from the Tenth Circuit because Andersen had been unable to obtain all of the requisite consents to disclosures from non-parties to the action, which stay remained in effect until January 10, 1977.

By July 29, 1976, Andersen had produced all, or the responsive portions, of 195 of the 220 documents ordered produced and had filed a list describing each of the 25 documents not yet produced and identifying the non-party consents Swiss counsel advised were required by both the Swiss criminal and civil law before the remaining documents could be produced.

As Andersen obtained the required consents of such non-parties, or was able to find copies outside of Switzerland of documents identified by its search of the Geneva files, it produced the documents. By January 21, 1977, five months after the district court's deadline for discovery, but only eleven days after the expiration of the stay, Andersen had produced all of the documents in respect of which the severe sanctions were imposed four months later without any prejudice to plaintiff having been established.

On May 23, 1977, the district court severely sanctioned Andersen for its delayed compliance. The court entered an order that at trial Andersen "shall not oppose or introduce any evidence opposing [two of] plaintiff State of Ohio's [principal] claims" and awarded plaintiff $59,949. *State of Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 25-26 (D. Colo. 1977). The Tenth Circuit affirmed.

Andersen did decline to provide each document ordered to be produced until it had obtained the required consents or located copies thereof outside of Switzerland.



As a consequence the ordered discovery was delayed beyond deadlines imposed by the district court, but full compliance was delayed only eleven days after the expiration of the stay. Andersen has been severely sanctioned for the delay caused by the necessity to obtain the required consents in order to avoid violating both the criminal and civil laws of Switzerland. As of the date of the filing of this petition, Ohio has had all the documents in question for 17 months and has used them during depositions of Andersen personnel; and the court has not as yet considered setting a trial date.

## REASONS FOR GRANTING THE WRIT

### I

This petition presents for review the question whether it was a denial of due process or a violation of federal law to impose a preclusionary order and fine against a defendant who has made full discovery, but whose delay in compliance with the ordered discovery was caused by the requirements of the criminal and civil laws of Switzerland that prior to production the defendant obtain consents of non-parties whose protected business secrets were included in the documents ordered produced. All the documents in question were produced as and when the defendant, at a total cost of over $71,000, obtained the required consents or was able to locate copies of the documents outside of Switzerland. No prejudice to plaintiff as a result of the delay was established.

The conflict between domestic discovery orders and foreign legal prohibitions to be resolved is one potentially confronting every American firm which does business abroad. The conduct of business on a world-wide basis is now commonplace. Each company engaged in such business is required to comply with the laws of each country in which it conducts its business. This case presents an

important due process and federal law question which is likely to recur with increasing frequency and which should be addressed by this Court.

It is respectfully submitted that the district court's imposition of the preclusionary sanction and fine against the defendant in these circumstances was contrary to the Due Process Clause, contrary to this Court's decision in *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), and contrary to applicable decisions of the Second Circuit: *Trade Development Bank v. Continental Insurance Co.,* 469 F.2d 35 (2d Cir. 1972); *United States v. First National City Bank,* 369 F.2d 897 (2d Cir. 1968); *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson,* 282 F.2d 149 (2d Cir. 1960); *First National City Bank v. Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960).

In *Societe* a Swiss company—a plaintiff, which had voluntarily sought the aid of a United States district court —had produced from Switzerland, after obtaining consents or otherwise meeting the prohibitions of Swiss law, substantial quantities of documents ordered produced by the district court. However, the plaintiff had declined to produce from Switzerland thousands of documents ordered produced because of its inability to comply with Swiss law as to them. Even though the plaintiff had first been ordered to produce these documents nine years before this Court's decision, this Court held that, in light of the Due Process Clause, dismissal of plaintiff's case was inappropriate and indicated that the most severe punishment appropriate for the *non*-production *might* be the "[possible] drawing [of] inferences [at trial] unfavorable to petitioner as to particular events" if production had not then been made. *Societe,* 357 U.S. at 213.

> "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign country." *Id.* at 211.



This is an *a fortiori* precedent for a defendant who has been involuntarily brought before a court by legal process.

Andersen, the defendant in the instant case, sought to excuse only delay — not non-production — because of fear of criminal prosecution that could be directed at its personnel in Switzerland, civil litigation, and potential loss of its license to do bank and mutual funding auditing if the ordered discovery were provided from Switzerland without first obtaining the necessary consents.

Reduced to fundamental principles, *Societe* and the cited decisions of the Second Circuit establish that the Due Process Clause and federal law require that a conflict between an order directing discovery from a foreign country and a discovered party's (even a plaintiff and most certainly a defendant) inability to respond because of the prohibitions of foreign law should be reconciled by affording the discovered party every reasonable opportunity to comply right up to the time of trial so long as the discovered party persists in its efforts to provide the discovery ordered. This basic due process requirement was disregarded in this case — the district court issued orders directing immediate production without regard to whether such production would violate Swiss law, and then severely sanctioned Andersen for non-compliance with the deadline imposed.

> "Now I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, *but in any event, with or without consents, the Court wants full compliance by the 20th of August on these 20 or 25 documents . . .*" (Emphasis added.)

Andersen's efforts to obtain the district court's assistance in establishing procedures satisfactory to the district court and parties which would permit Andersen to provide the ordered discovery in a manner compatible with Swiss law were rejected. Andersen then proceeded in the same manner as the petitioner in *Societe* — withholding production while seeking consents or alternative means to satisfy to the extent possible the requirements of Swiss law, and producing the documents as and when the requirements of Swiss law were met or obviated at great expense to Andersen.

The district court viewed defendant Andersen's good faith efforts to reconcile the conflict between its order and Swiss law as a charade, obstruction and avoidance. The Tenth Circuit adopted the district court's erroneous findings of fact and conclusions of law and affirmed.

It is respectfully submitted that a party's failure to make production from a foreign country until it has complied with the applicable criminal and civil laws of that country is not a charade, obstruction and avoidance, bad faith or sanctionable conduct but is appropriate under the Due Process Clause, the decision of this Court in *Societe*, the cited Second Circuit decisions, and the realities of today's world where companies are increasingly subject to the laws of more than one sovereign.

It is further submitted that the Due Process Clause and federal law as interpreted in *Societe* and the Second Circuit cases require the Federal Rules of Civil Procedure to be applied in a manner which permits the discovered party to comply with discovery orders in a manner compatible with foreign law, and that the conflicting decision of the district court affirmed by the Tenth Circuit should be reversed and brought into line with those decisions. Rule 19(1)(a) and (b) of the Supreme Court Rules.

Consideration of the important question presented should not be denied because of errors of fundamental facts



by the district court, adopted by the Tenth Circuit, which form the basis for their erroneous conclusions that Andersen did not proceed as outlined in Andersen's Statement at pp. 3-5. Contrary to the basic facts found by the district court, and adopted by the Tenth Circuit, the record establishes unequivocally that:

(i) Andersen was not ordered to provide discovery from Switzerland until May 27, 1976 and thus did not delay from November 1975 to May 27, 1976 making the production ordered. (Compare Appendix B, pp. 25-29, with Tenth Circuit opinion, 570 F.2d at 1373, 1374).

(ii) Andersen did not improperly delay the review by counsel of its files in Geneva, Switzerland, but rather undertook that review promptly after it became incumbent upon it to do so. (Compare Appendix C, pp. 30-39, with Tenth Circuit opinion, 570 F.2d at 1374).

(iii) Andersen adhered throughout to its position of not providing the ordered discovery until the Swiss law prohibitions had been met and at no time abandoned this position. (Compare Appendix D, pp. 40-51, with Tenth Circuit opinion, 570 F.2d at 1374).

(iv) Andersen did not obtain the consent of I.O.S., Ltd. until December 1976 and thus did not delay from May 1976 to December 1976 producing the documents covered by that consent. (Compare Appendix E, pp. 52-62, with Tenth Circuit opinion, 570 F.2d at 1373).

(v) Andersen's production from sources other than Geneva of copies of certain of the documents not identified until the search of its files in Geneva was a good-faith effort to obviate Swiss law prohibitions and to make production more quickly than would otherwise have been possible because under Swiss law no consents were required to produce copies located outside Switzerland. (Compare Appendix F, p. 63, with Tenth Circuit opinion, 570 F.2d at 1373, 1374).

To deny reveiw because of erroneous basic conclusions would emasculate *Societe* and would enable lower courts to evade review where the principles of *Societe* have been violated by arriving at unsupported conclusions. See *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 641, 643 (1975), where this Court granted certiorari and reversed the Third Circuit, which the Supreme Court found had arrived at erroneous conclusions contrary to those of the district court.

## II

This case presents for review a second important due process and federal law question: whether under Rule 37, F.R. Civ. P. a preclusionary order may properly be entered against a defendant, in the circumstances of this case, directing the defendant "not to oppose or introduce any evidence opposing [two of] plaintiff State of Ohio's [principal] claims", not for the purposes of compelling discovery (which had been fully made) or to redress prejudice (which was not established), but solely to punish the defendant and to set an example for others.

Rule 37, F.R. Civ. P. — "Failure To Make Discovery: Sanctions" — provides a means by which the trial court can insure that the purposes served by the pre-trial discovery process are fulfilled. Thus, Rule 37 sanctions may be imposed when necessary to compel a party to furnish discovery or to prevent prejudice to one party which otherwise would result from its adversary's abuse of the discovery process. See, *e.g., Dorsey v. Academy Moving & Storage, Inc.,* 423 F.2d 858, 860 (5th Cir. 1970); *Robison v. Transamerica Ins. Co.,* 368 F.2d 37, 39 (10th Cir. 1966); "The Emerging Deterrence Orientation In The Imposition Of Discovery Sanctions," 91 Harvard L. Rev. 1032, 1038-1040 (1978) ("*The Deterrence Orientation*").



Compatible with these principles, a trial court's selection of the particular Rule 37 sanction to be imposed in a particular case should be guided by a consideration of the nature of the discovery abuse involved and the framing of a remedy which rationally relates to curing that abuse. See, *e.g.,* "An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed For The Purpose Of Insuring Compliance With Pre-Trial Orders," Hon. Sterry R. Waterman, 29 F.R.D. 420, 426 (1961) ("the appellate court should only insist that the 'punishment fit the crime.'"). Thus, courts have held that it is proper to impose the preclusion sanction authorized by Rule 37(b)(2)(B) — "an order refusing to allow the disobedient party to support or oppose designated claims or defenses . . ." — when the "disobedient party" has refused to provide discovery respecting such "designated claim or defense." The rationale is clear, and sensible: that a party's failure or refusal to produce such information as to a claim, when it is within his power to produce such information, constitutes a logical and fair basis for "presuming" that the party's position respecting that claim lacks merit. Under such circumstances, the sanction also addresses the prejudice theoretically caused to the discovering party which has been deprived of the full evidence respecting the claim. *Societe, supra,* 357 U.S. at 212-213; *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 350-351 (1909); *Norman v. Young,* 422 F.2d 470, 473 (10th Cir. 1970); "Standards For Imposition Of Discovery Sanctions," 27 Maine L. Rev. 247, 251 (1975).

The district court's imposition of a preclusion sanction upon defendant Andersen was in clear conflict with these principles. Several months prior to the imposition of the preclusion sanctions Andersen had provided *all* the discovery which formed the purported basis for the sanction imposed. Thus there was and could be no logical basis for the drawing of a presumption adverse to Andersen based on the absence

of information because all the information had been made available. Furthermore, the discovery was furnished in time for the discovering party to use it during depositions and the discovery is available for any appropriate use at trial (no trial date yet has been considered by the court). Thus, there is no substantive "prejudice" to the discovering party which the "preclusion" sanction rationally could redress.

In these circumstances the district court's imposition of the preclusion sanction — an order which bears no rational relationship to the effectuation of the discovery process or to the remedying of any harm suffered by the discovering party — can only serve a punitive function. That sanctions, purportedly imposed under Rule 37, may not be imposed purely "for punishment's sake" is the explicit teaching of decisions of this Court and other courts which have emphasized the constitutional constraints upon a trial court's exercise of its powers under Rule 37. See, *e.g.*, *Societe, supra,* 357 U.S. at 109 ("the provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . "). The "preclusion sanction" has been referred to as tantamount to a "partial . . . summary or default judgment", *SEC v. Los Angeles Trust D. & M. Exch.*, 24 F.R.D. 460, 466-467 (S.D. Calif. 1959). It follows that the exercise of the power to preclude under Rule 37 for the purpose of punishing a defendant or to deter others violates due process and federal law.

In its judgment, the Court of Appeals for the Tenth Circuit disregarded these concerns. It stated as follows:

> "In opposing the sanctions, Andersen emphasizes that it finally produced the documents. Final production is not determinative. The Rule permits a sanction when a party 'fails to obey an order.' Andersen refused willfully to obey for an unreasonable time on the contrived excuse, eventually abandoned,[*] of the Swiss secrecy laws. The ultimate, and reluctant, production of documents, more than a year[*] after a legitimate request, does not absolve Andersen of the charge that it willfully failed to obey a valid court order." (*State of Ohio v. Andersen,* 570 F.2d at 1374).



And, while acknowledging that the "presumption rationale" in respect of documents *not* produced traditionally constituted the necessary justification for the imposition of sanctions under Rule 37 (*id.* at 1374-75) the court of appeals, at the same time, in effect held that neither that rationale — nor any other rational justification — need be present when "a party fails to obey an order" (*id.* at 1374). If the court of appeals' approach is permissible, then *any* sanction, no matter how harsh, can be imposed and will be deemed a reasonable exercise of discretion. The court of appeals cited this Court's holding in *National Hockey League, supra,* at 643, as support for this result, apparently because of the observation in *National Hockey League* that the imposition of sanctions may serve a "deterrent" purpose, ignoring this Court's qualification of that observation by "in appropriate cases."

If the interpretation of *National Hockey League* implicit in the court of appeals' decision is correct, this Court has effected an extremely significant and far-reaching change in the traditional understanding and application of the discovery sanctions. Indeed, commentary has suggested that *National Hockey League* should be interpreted as permitting or even as encouraging the imposition of sanctions for the purpose, not of effectuating discovery in a particular case, but for "affecting the conduct of parties not currently

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[*] As shown in Appendices B and D, the references to Andersen's "abandonment" of Swiss law and to delay of "more than a year" are based on fundamentally erroneous conclusions of both the district court and the Tenth Circuit.

before the court," *"The Deterrence Orientation", supra,* p. 1048, and as encouraging trial courts "to consider systemic needs" in selecting a sanction (*id.* at 1052) — *i.e.,* a sanction imposed on a single litigant in a particular case is to be justified by how, and to what extent, it addresses the sociological facts that "court dockets are more crowded [and] cases are more complex . . ." (*id.* at 1055).

Petitioner's view is that *National Hockey League* contained no such revolutionary rejection of the law requiring that the imposition of Rule 37 sanctions be a reasoned exercise of power rationally related to considerations of the pre-trial discovery process in a particular case. In *National Hockey League* there was an unjustified failure in discovery which prejudiced (or would prejudice) the moving party on the merits.

Accordingly, in *National Hockey League* this Court appears to be stating that a justifiable imposition of discovery sanctions can have a deterrent effect — *not,* as the Court of Appeals for the Tenth Circuit has in effect held here, that the powers of Rule 37 can be invoked *solely* for such purpose. If, however, *National Hockey League* is to be construed in the latter fashion, it raises serious and difficult constitutional questions:

> "serious constitutional obstacles must be acknowledged when sanctions are invoked purely for the purpose of deterrence. Although the sanctions of dismissal or default may be imposed after minimal civil process, criminal process may be essential where the court inflicts other sanctions for this purpose." *("The Deterrences Orientation," supra,* p. 1055).

The instant case is exemplary of numerous cases which have arisen in the short period of time since *National Hockey League* which have grappled with these questions. Surely, the number of cases involving these questions in the future will be considerable. This case thus presents the Court with



an opportunity to consider the important question of the extent to which Rule 37 sanctions may be imposed to limit a party's rights to fully contest its adversary's claims at trial and eliminate uncertainty in the wake of *National Hockey League.*

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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